SERVED: March 4, 1992

NTSB Order No. EA-3506

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 4th day of February, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation Administration,

Complainant,

v.

WILLIAM C. LATHAM,

Respondent.

Docket SE-10009

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge William E. Fowler on September 20, 1989 at the conclusion of an evidentiary hearing.[1] The law judge found that respondent violated sections 91.5, 91.91(b), and 91.9 of the Federal Aviation Regulations ("FAR"), 14 CFR Part 91,[2] and suspended respondent's private pilot certificate for 45

[1] That portion of the hearing transcript containing the initial decision and order is attached.

[2] FAR section 91.5 (currently 91.103) provides in part:

Each pilot in command shall, before beginning a flight, become familiar with all available information concerning

days. We affirm in part and reverse in part.

On November 11, 1987, respondent was the pilot-in-command of N712CE, a Rockwell Commander 690A, on a passenger-carrying flight from the New Orleans, LA area to the Manassas Municipal Airport in Manassas, VA. Prior to departure, respondent contacted flight service and was advised that a NOTAM had closed Washington National Airport due to snow, but that it had reopened after plowing. Respondent's unrebutted testimony indicates that, at the time, he was not informed of a NOTAM closing Manassas airport, and the law judge was unable to determine whether such a NOTAM had even been issued prior to takeoff.[3]

When respondent arrived in the Manassas area (in late afternoon, before dusk), it was no longer snowing. Respondent contacted the airport by Unicom radio. The law judge found that respondent was advised that the airport was closed because of the

---

that flight.

FAR section 91.91(b) (currently 91.137(b)) provides in part:

> When a NOTAM [Notice to Airmen] has been issued . . . no person may operate an aircraft within the designated area . . . .

FAR section 91.9 (currently 91.13(a)) provides in part:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3] As a result, the Administrator in his reply to the appeal has withdrawn the section 91.5 charge. Accordingly, this aspect of the complaint will not be further discussed.

snow removal.[4] Respondent circled the airport for some period, awaiting departure of the plows. He then made a low pass down the runway to verify it was clear. He landed without incident.

In concluding that respondent violated sections 91.91(b) and 91.9, the law judge made various subsidiary findings. Specifically, as to section 91.91(b), he found that a NOTAM had been issued, and was in effect at the time of respondent's landing. The finding of a section 91.9 violation was based on the law judge's conclusion that, in view of the information respondent received via Unicom, he should have inquired further (such as by contacting other FAA installations) as to whether he could land at Manassas. The law judge held that respondent's failure to do so "potentially" endangered the life or property of another.

Respondent's appeal first addresses the law judge's finding that a NOTAM was in force at the time of the landing. Respondent claims that the record cannot support a finding that a NOTAM was issued and, therefore, the law judge's finding of a section 91.91(b) violation cannot stand.

We agree. The law judge relied entirely on the testimony of

---

[4] The record is not entirely clear as to exactly what was said to respondent. The witness alternately testified that he told respondent that he thought the runways were closed (Tr. at p. 11), and that he thought the airport was closed (Tr. at p. 20). Exhibit A-1, this witness' letter to the FAA regarding the events, states "I told the aircraft that I thought the runway was closed due to snow removal." Respondent testified he was told that the "runway is closed." Tr. at p. 104. The difference is not material, as the import is exactly the same in the circumstances. Although there are two runways, only one was plowed during the relevant period. Tr. at p. 105.

the airport manager, who testified he had "imposed" the NOTAM in the early afternoon via a telephone call to the Leesburg Flight Center. The law judge apparently assumed that, as the call had been made, a NOTAM had issued. The Administrator has, however, admitted that the airport manager had no authority to impose a NOTAM (Reply at p. 5); rather, his role is to request that one be imposed.

In fact, the record contains no evidence that a NOTAM was actually issued. The NOTAM itself was not produced, as they apparently are routinely destroyed. Tr. at pp. 59, 64. Nor did any FAA employee testify to issuing one here. The Administrator's FAA witness had no actual knowledge of the events leading to this proceeding.

In these circumstances, we feel compelled to dismiss this aspect of the complaint. We do not think this action is unduly technical. Section 91.91(b) can only be violated if a NOTAM is in force. While it may be reasonable to assume that, once a request is made, a NOTAM is issued, the fact remains that the Administrator is required to prove the facts necessary to establish alleged FAR violations.[5] Assumptions are not enough, especially absent any showing based on past experience that they are valid.

Respondent next challenges the law judge's finding that section 91.9 was violated, claiming that respondent reasonably

---

[5] The Administrator did not produce the FAA employee directly involved in this matter, nor has he argued that he could not have produced the more directly involved individuals.

relied on the information he received via Unicom from the airport. Respondent's reliance on Administrator v. Graves, 3 NTSB 3900 (1981) is misplaced. There, we found that a pilot may reasonably rely on "advice received from the government agency to which the Administrator had entrusted responsibility for controlling air traffic in the area covered by the NOTAM." Id. at p. 3904. In this case, respondent did not rely on advice from the government nor was the advice as specific as in Graves. Although no damage was done, respondent's action was inherently dangerous and a finding that section 91.9 was violated is warranted. Accord Haines v. Department of Transportation, 449 F.2d 1073 (D.C. Cir. 1971). We agree with the Administrator and the law judge that, prior to landing, respondent should have made further inquiry (of the flight center, for example) concerning conditions at the airport.[6] Thus, we affirm the violation of section 91.9.

Finally, we must address the matter of sanction. The law judge's 45-day suspension is excessive in the face of withdrawal of the section 91.5 charge and our dismissal of the section 91.91(b) claim. We find that the sanction for the section 91.9 violation should be a suspension of respondent's private pilot certificate for a period of 7 days.

Despite the Administrator's arguments suggesting the contrary, the unrebutted testimony indicates that, in landing at

---

[6] It appears that respondent's familiarity with the airport and past practice there led him to assume things that he should not have assumed.

Manassas: respondent circled until personnel and equipment were well off the runways; he then made a low run to ensure that conditions on the ground were safe; and respondent only landed upon finding that the runway was free of people, free of snowplows, and free of ice. The landing was routine.[7] No specific harm was either proven or seriously argued. In addition, the Administrator offered no rebuttal to respondent's testimony (Tr. at pp. 105-106) implying the superiority of this particular type aircraft in landings on snow.

There also is evidence in the record (again with no contradiction from the Administrator) to the reasoning behind respondent's choice to land at Manassas rather than another nearby airport. He noted that the runways at Dulles would have snowpack, both Dulles and National would have slush and, therefore, neither would be safer than Manassas (Tr. at pp. 106, 111). In view of these mitigating circumstances, we find that a 7-day suspension of respondent's private pilot certificate is appropriate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is granted to the extent discussed above;

---

[7] The Administrator's witnesses did not testify to any personal knowledge of the position of the plows when respondent landed or to the condition of the runway after the landing. The law judge properly excluded hearsay testimony that snowplows were on the runway at the time. (Again, there is no indication why the Administrator did not produce the witness who ostensibly saw the landing.)

2. The Administrator's order (as modified by withdrawal of the section 91.5 charge) and the initial decision are reversed except to the extent that a violation of 14 C.F.R. 91.9 is affirmed; and

3. The 7-day suspension of respondent's private pilot certificate shall commence 30 days after service of this opinion and order.[8]

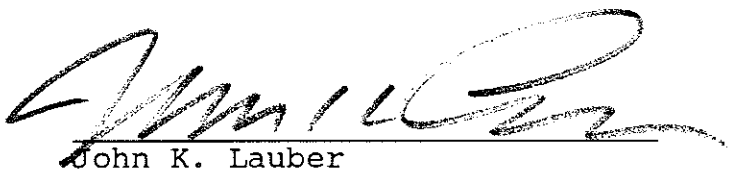
KOLSTAD, Chairman, COUGHLIN, Vice Chairman, HART, Member of the Board, concurred in the above opinion and order. Member LAUBER submitted the following dissenting statement in which Member HAMMERSCHMIDT joined.

[8] For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the Federal Aviation Administration pursuant to FAR section 61.19(f).

Notation 5638
February 5, 1992

John K. Lauber, Member, Dissenting:

I respectfully dissent from the majority opinion in this case. Far from acting in a careless or reckless manner so as to endanger the life or property of another, Respondent at all times operated his aircraft in a safe and prudent fashion. Although it is true that he did not contact Flight Service to determine the status of the airport at the time of his arrival, this is hardly indicative of carelessness or recklessness. First, there is no requirement that such contact be made. Second, it is not established that a NOTAM closing the airport was ever issued; even if Respondent had asked Flight Service, it is not at all clear that he would have been given any useful or reliable information pertaining to the airport status. Third, rather than relying on advisory information that may or may not have been obtained from Flight Service personnel who were some distance from the airport, the pilot made use of far more direct and reliable information regarding the status of the airport: contact with the UNICOM operator, and, direct visual observation of the airport and runway. Having circled in the vicinity until plowing operations were apparently completed, Respondent made a low pass to verify that the runway was clear before landing uneventfully. Accordingly, I don't agree that a 91.9 violation is established, and I would grant the respondent's appeal in its entirety.



John K. Lauber

Member Hammerschmidt joined Member Lauber in his dissenting statement.